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**Ex Parte Submission – Filed Electronically Via ECFS**

Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12th Street, SW  
Washington, DC 20554

RE: Preserving the Open Internet, GN Docket 09-191

Dear Ms. Dortch:

In its letter dated January 13, 2011, Verizon makes a variety of claims and arguments regarding the interconnection and payment dispute between Comcast and Level 3. Primarily, Verizon argues that the dispute between Comcast and Level 3 is a “run-of-the-mill commercial negotiation” over backbone peering, and that there is no role for the Commission to play in the resolution of the dispute. Verizon also contends that the dispute does not implicate any concerns under the Commission’s December 23, 2010 Open Internet Order. In both instances, Verizon misses the point.

It is not surprising that Verizon agrees with Comcast’s position on the underlying dispute. Both Verizon and Comcast are multichannel video programming distributors, both are broadband Internet access providers, and both offer Internet backbone services. Thus Verizon has the same vested interest in being free to discriminate against competing content as does Comcast. The Commission clearly recognized broadband Internet service providers’ incentive to discriminate in the Open Internet Order.<sup>1</sup>

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<sup>1</sup> “Today, broadband providers have incentives to interfere with the operation of third-party Internet-based services that compete with the providers’ revenue-generating telephony and/or pay-television services. . . . Online video aggregators such as Netflix, Hulu, YouTube, and iTunes that are unaffiliated with traditional MVPDs continue to proliferate and innovate, offering movies and television programs (including broadcast programming) on demand, and earning revenues from advertising and/or subscriptions. Several MVPDs have stated publicly that they view these services as a potential competitive threat to their core video subscription service. Thus, online edge services appear likely to continue gaining subscribers and market significance, which will put additional competitive pressure on broadband providers’ own services. By interfering with the transmission of third parties’ Internet-based services or raising the cost of online delivery for particular edge providers, telephone and cable companies can make those services less attractive to subscribers in comparison to their own offerings.” *Preserving the Open Internet; Broadband Industry Practices*, Report and Order, GN Docket 09-191, paragraph 22 (the “Open Internet Order”).

**A. Peering and Transit in The Backbone.**

The Verizon letter discusses at length the existing market conditions for *Internet backbone* traffic exchange. Level 3 *agrees* with Verizon that the market for backbone peering and transit is highly competitive with multiple carriers providing a wide array of direct and indirect connections, enabling a robust and reliable Internet experience for most subscribers.

The debate with Comcast, however, is not about backbone peering. Potential abuse of peering in the backbone can occur where traditional “hot potato routing” (where one network delivers traffic to the other at the point that is closest to the location where the delivering party received the traffic) imposes unfair burdens on one party to a peering arrangement. Neither Comcast nor Level 3 has made any allegation that either party is “gaming” the backbone system in this fashion. Rather, the parties agree that the dispute involves whether Comcast should be permitted to impose a charge when content requested by Comcast’s subscribers is transferred from Level 3’s backbone to Comcast’s exclusive local access network.

Verizon’s letter confuses the issue in two regards. First, it implies that this is purely a backbone transaction. Second, even if it were a backbone peering issue, Verizon makes it seem that the send vs. receive “traffic ratio” is the sole measure of whether backbone peering is mutually advantageous and fair. As noted by a group of Internet engineers in a December 20, 2010 letter to the Commission, “traffic ratios are an outdated and misleading metric for determining equality and financial burden, and are not commonly considered in ‘good faith’ discussions between content and access providers seeking interconnection.”

As Verizon knows, any two interconnected backbone providers must make sufficient network capacity available to carry the cumulative traffic needed by their respective customers, regardless of the direction of traffic flow. If two providers wish to interconnect “equitably,” then the proper measure of “equity” is the relative capacity-miles (or “bit-miles”) each party provides.<sup>2</sup> The truth of this statement is made obvious by a simple example: If a backbone Internet service provider transmits edge provider content from all over the world directly to a broadband Internet service provider’s metropolitan access network location, the backbone provider is bearing essentially all of the cost of traffic delivery. The direction of traffic measured at the point of interconnection would not change from that measured if the interconnection occurred at some intermediate point. It is clear that traffic ratios do not reflect any notion of economic parity.

Direction of traffic flow between a backbone provider and an Internet service provider is equally irrelevant from a revenue perspective. Internet service providers charge their customers

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<sup>2</sup> Verizon asserts that “Level 3 itself has previously recognized the benefits of the current regime relying on market-based negotiations and that takes into account, among other things, relative traffic flows,” referencing our past dispute with Cogent. Level 3’s dispute with Cogent involved a disagreement over each party’s relative value and network burden, having more to do with “hot potato” routing and bit-mile balance than simple traffic ratios. In any event, neither Level 3 nor Cogent have a dominant position with respect to consumer Internet subscribers and the comparison is thus nonsensical.

for the right both to upload and to download information.<sup>3</sup> In fact, as reflected by Comcast's broadband offer of five times the download speed as upload speed, Comcast *expects* to receive much more traffic than it transmits.

In fact, order to avoid this dispute, Level 3 proposed to Comcast that Level 3 would (at significant expense to it) deliver traffic to Comcast at locations that are conveniently close to the vast majority of Comcast's subscribers. This offer was intended to eliminate any undue cost burden on Comcast by essentially eliminating any need to utilize Comcast's backbone facilities. Comcast effectively rejected Level 3's offer by saying it need extensive engineering and financial analysis before deciding whether to accept Level 3's offer. If, as its letter implies, Verizon's support for Comcast rests on the belief that "Level 3 seeks to change the way interconnection is handled apparently in an effort to enhance its margins on its new CDN operations and avoid bearing the costs for the added burden on the networks with which it interconnects," then our offer to interconnect such that Level 3 bears the substantial majority of the "backbone" costs should eliminate Verizon's concern.<sup>4</sup> As others have also recognized,<sup>5</sup> Comcast, and not Level 3, is seeking to "change the way interconnection is handled" by, for the first time, seeking to combine a backbone and access service and charge a toll to access the consumers who can only be reached through its dominant access network.

Incredibly, Verizon suggests that Level 3 can solve what it calls a "backbone peering dispute" by investing "to expand the reach and capacity of [its] own network" so as to deliver the content it carries, rather than "dumping" its traffic on Comcast's network. This suggestion is absurd and completely misplaced. There is no way for Level 3 to carry its customer's content all the way to Comcast's captive broadband Internet subscribers, except by duplicating Comcast's local cable facilities, becoming an Internet service provider, and taking away those Comcast subscribers. Verizon effectively suggests that the solution to peering disagreements is to concede defeat and eliminate cooperation within the Internet – upending the "network of networks" that has delivered stunning improvements in communication technology for nearly 2 decades.

Nor is the dispute about "transit" services. Verizon incorrectly states that to "the extent that Level 3 increases the traffic that it delivers to those providers, those end-users serving providers are likely not only to bear additional expense within their networks to handle the additional traffic volumes but also are likely to pay more to Level 3 for the transit expenses

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<sup>3</sup> Verizon's suggestion that Comcast is not "compensated in some form to carry disproportionately larger volumes of traffic" is completely contrary to fact. That is the precisely reason Comcast's subscribers pay for Comcast's service each month so they can receive large volumes of traffic of their choice that far exceed the volume of traffic that they upload. Those subscribers compensate Comcast handsomely for bringing them content delivered by Level 3 and others. There is no basis for Comcast to demand additional compensation from Level 3 for the same service.

<sup>4</sup> Level 3 notes that while "bit-mile" balance may be relevant when two parties that both operate in competitive markets seek to interconnect, it should not be the sole consideration when one party has exclusive control over a set of consumers seeking access to Internet content. Such a party can use its dominant position to extract a fee that is clearly prohibited by the Open Internet Order. Such discriminatory actions are not theoretical as evidenced by Comcast's "take it or leave it" demand of Level 3.

<sup>5</sup> See, e.g., December 8, 2010 letter from New America Foundation, Media Access Project and Free Press.

associated with that traffic.” Level 3’s transit offering to Comcast enables Comcast to reach content, applications and end users that are connected to other backbone networks connected to Level 3, hence the term “transit.” Level 3 recovers its costs by charging its transit customers a fee. Comcast has multiple competitive choices (apparently including Verizon itself) from which it can purchase such transit services. In the present dispute, Level 3 never proposed to require Comcast to pay Level 3 for interconnection and traffic that is the subject of our present dispute. Rather, Comcast made a “take-it-or-leave-it” payment demand on Level 3.

**B. Application of the Open Internet Order.**

Verizon strenuously argues that the Open Internet Order does not apply to Comcast’s conduct. If accepted, Verizon’s conclusion would mean that the Open Internet Order does not constrain “toll-seeking” behavior by Comcast, Verizon or any other broadband Internet service provider in an interconnection arrangement.

Verizon adopts a constrained interpretation of the Open Internet Order that would, if followed, largely eviscerate the protections that the Commission intended to implement. Verizon argues, for example, that the Commission concluded that “content delivery network services, . . . hosting or data storage services, or Internet backbone services,” among other things, are outside of the scope of its new rules. But Verizon completely misreads the Open Internet Order. Nobody can seriously doubt that Comcast’s (and, for that matter, Verizon’s) consumer Internet offering qualifies as a “broadband Internet access service” under the Open Internet Order. The fact that Comcast argues that it also provides “Internet backbone service” does not change this fact. The language in the Open Internet Order that Verizon conveniently eliminated from its letter confirms Level 3’s position. The Commission made it clear that “Internet backbone services” offered by Verizon or Comcast would be excluded from the scope of the order only “if those services are separate from broadband Internet access services.” As the commission expressly noted in footnote 150, “We also note that our rules apply only as far as the limits of a broadband provider’s control over the transmission of data to or from its broadband customers.” If a broadband Internet access provider’s customers can only be accessed through an “Internet backbone service” offered by that same service provider, then excluding that backbone service from the scope of the Open Internet Order enables the very discrimination the Commission seeks to prevent.

Verizon’s quotation of remarks made by James Crowe, Level 3’s CEO, concerning the financial impacts of the Comcast dispute are accurate but incomplete. Mr. Crowe indicated that the toll levied by Comcast was not material to Level 3’s financial results and that, given the company’s extensive physical network and broad portfolio of services, Level 3 would adapt to whatever the outcome of the instant dispute might be. However, he also indicated his strong belief that Comcast’s actions are a threat to an open Internet of the kind identified by the Commission in the Open Internet Order.

Verizon also argues that some content providers have an alternative of “foregoing third-party CDNs and transit providers by building their own networks. In fact, many significant

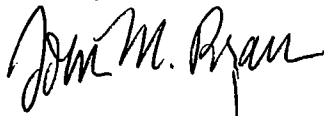
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providers, 'such as Google, Microsoft, and Yahoo, are building their own global networks, which basically operate as internal CDNs.'" As Level 3 has previously pointed out, it is true that certain very large content providers have sufficient traffic to justify building a backbone network. These companies are small in number, and are very large and well established entities. In general, these companies seem well able to vigorously pursue their interests. As the Commission has pointed out, it is smaller providers of commercial, social, news and political content, some of whom are yet to be started, that need the kind of protections provided by the Open Internet Order.

Verizon concludes by stating that the "Commission reject Level 3's efforts to upset the well-functioning and pro-consumer marketplace that exists today by interjecting regulatory involvement in place of true, market-based negotiations for interconnection of networks." This position is no surprise. In a press release concerning the Open Internet Order dated December 21, 2010, Verizon stated, "Based on today's announcement, the FCC appears to assert broad authority for sweeping new regulation of broadband wireline and wireless networks and the Internet itself. This assertion of authority without solid statutory underpinnings will yield continued uncertainty for industry, innovators, and investors. In the long run, that is harmful to consumers and the nation." Having rejected the whole basis of the Commission's order, it is understandable that Verizon would support Comcast's position that it has a unilateral right to discriminate against competing online content by forcing interconnection at locations of its exclusive choice and referring to the interconnection required to reach its broadband Internet access consumers as a "backbone service."

Sincerely,

A handwritten signature in black ink that reads "John M. Ryan". The signature is written in a cursive, flowing style.

John M. Ryan  
Chief Legal Officer  
Level 3 Communications, Inc.

cc: Sharon Gillett  
John Flynn  
Rick Kaplan  
Edward Lazarus